IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MASS ENGINEERED DESIGN, INC., Plaintiff,	)	3:16-cv-01510-SI
vs.	)	August 25, 2016
PLANAR SYSTEMS, INC., Defendant.	)	Portland, Oregon

(Status Conference)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

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(August 25, 2016)

P R O C E E D I N G S

(In chambers; counsel present:)

THE COURT: All right. Good morning, everyone. We are here in the case of Mass Engineered Design, Incorporated versus Planar Systems, Inc., case 3:16-cv-1510, for a case management conference. I think it will be easier for me if I ask everyone to enter their own appearances right now, starting with folks representing Plaintiff Mass Engineered.

MR. MANSFIELD: John Mansfield, Mansfield Law, representing the plaintiff.

MR. EDMONDS: John Edmonds of Collins Edmonds representing the plaintiff.

MR. SCHLATHER: Steve Schlather of Collins Edmonds representing the plaintiff.

THE COURT: Here on behalf of Defendant Planar Systems, Inc., we have?

MR. GILL: Jacob Gill with Stoll, Stoll, Berne, Lokting & Shlachter.

MR. OLIVER: Andrew Oliver.

THE COURT: And do you want to enter your appearance as the client?

MS. HOLM JENSEN: Sure. Paula Holm Jensen, general counsel for Planar Systems.

THE COURT: All right. I believe I sent to you all

last night a draft case management order. I read a number of materials. First of all, I read your joint status report, and I appreciate that. I have also read the complaint, both in this case and the SpaceCo case. I have read the magistrate judge's opinion on the Markman hearing on the claim construction hearing in Texas, the judge's order adopting that and rejecting Planar's objection to the Markman decision. I've read the motion to dismiss or to transfer that was filed in the Texas case by Planar and the judge's decision on that.

I think where my thinking is, but I'll let you all respond to it, is that I want to follow the local rules that I'm used to in this district. They generally have been modified by me, but they are pretty close to the Northern District of California's, but that's what I have been doing in the few patent cases that I've had. I have not had that many patent cases, but these are the local rules that I think are fair and reasonable and that I'm used to.

I do understand that the Eastern District of Texas in this case and, frankly, in some other cases, and I really didn't really focus on it as much until recently appears to have this practice, am I correct, a practice of postponing deciding motions to transfer until after they deal with an awful lot of preliminary matters. I know some of the comments that have been coming down and the orders that have been coming down from the Federal Circuit -- by the way, I note that Planar

comments in their joint status report that that also violates the Fifth Circuit precedent, although I didn't see any Fifth Circuit cases cited to me, so I'm not really aware of those. But I really wasn't aware that that has been ongoing in the Eastern District of Texas. I just didn't know about it.

But that said, now that the case is transferred here, given that we already have a claim construction resolution, and I know that the Court in Texas tried to make it consistent with claim construction decisions that they've previously issued in earlier decisions on comparable patents, or at least the same '978 patent, from the Ergotron case, I don't think I'm prepared to fuss around with that claim construction hearing. I think it is what it is. The Court has tried to make it consistent among a number of cases involving the same patents, including across time. I do think that the federal judge in Texas carefully considered Planar's one objection to that and has rejected it, and I'm not planning on second-guessing that.

I understand there has been some discovery deadlines perhaps that have been met and passed in the Texas matter. I know that you all have some disputes regarding what should or shouldn't be allowed to be reopened now that the case has been transferred here. My objective is to try to get the right answer, notwithstanding the fact that I'm not going to second-guess the claim construction hearing; I'm going to assume that's the right answer, but I want to make sure that

justice is done. I take very seriously Rule 1 and the obligation of the courts and the parties now working together under our new amendments. It is quite clear to reach a speedy, just, and inexpensive resolution. I know that in patent litigation "speedy" and "inexpensive" may be relative terms, but that's okay. But I want to make sure we get a just resolution, which means getting the answers right. To the extent that means some parties may get, as I think as plaintiff put it, a "redo" of certain things in their expert opinion reports, I am going to allow that. You have seen the proposed schedule that I have.

I do want to talk to you and hear your opinions about this schedule, because I think as you've seen from what I sent last night, it doesn't really match what either side has requested. I know that plaintiff has asked for a trial date as soon as possible, as soon as maybe April or May. I know that plaintiff has the SpaceCo case going to trial in Denver in June. I assume it is going to be the same trial team from plaintiff.

I know that the defendant has asked for a trial date in July, or preferably even September, noting my preference that I am not going to schedule trials now for next August. Just personally I try to take a significant vacation every other August in odd-numbered years, so I am really trying to keep August reserved for my ability to take a family vacation.

I looked at the proposed schedules that you have all submitted. Looking at the defendant's proposed schedule of how long you have to do various items, there is no way that if I give you all of those dates we could have a trial ready before September or even October under those dates. So what you will see that I have done is I selected a date that works well for my calendar in July, basically starting a seven-day jury trial on July 17th, 2017 and then pretty much work backwards.

By the way, I have selected seven days. By the way, I know plaintiff says five days. I know that SpaceCo is scheduled for four days. It is totally fine with me, folks, if you do this in four or five days. But right now my July 2017 trial calendar is relatively open. It is a lot easier for me to set this for a seven-day jury trial. To the extent that you only take four or five days, I will assure you that I will have plenty of good work to do in that intervening time, and taxpayer money will not be wasted. It will be a lot easier if we do it this way than if I were to set this for a four- or five-day trial, set other things around it as time progresses, and then if you all tell me that you've miscalculated, that you really do need six days or seven days for trial, it may be a lot more disruptive to fit it in then. So I am going to set it for seven days. Feel free to use less.

So I started working backwards. What I normally do is have a significant pretrial conference a week, sometimes two

weeks before the trial date. When I first put together my draft of this schedule and worked backwards, that put too much pressure on other things. So I figure we can have a pretrial conference six days before the trial, get an awful lot accomplished. To the extent that we will need a second pretrial conference, we will schedule that three days later in between the first and the trial date.

Then there is an awful lot of things that have to be done -- at least the way I run my pretrial conferences -- by the parties before the pretrial conference so I can be fully prepared to make significant, substantive rulings. I pretty much get this case fully packaged and ready to go to the jury -- that oftentimes includes jury instructions -- at the pretrial conference.

So I'm then working backwards along the various things that you have suggested and requested. I think it was mostly Planar that asked for larger chunks of time between the various items, but it just didn't work to get us where we needed to get to have a trial in July. It really would have forced a trial in September. I thought that really wouldn't be fair to the plaintiffs, who filed the case back in 2014 and wanted a trial sooner rather than later. So my compromise was July, and that means I am going to have to condense or compress a number of other dates.

I don't think that anything is particularly

unrealistic or extremely burdensome, but I'll be glad to let you tell me whether I've missed something or think there is some tweaks or modifications that you think I really should consider.

Then for the pretrial documents that need to be filed, I thought it would make most sense, both in terms of your efficiencies and economies for both parties, if you know what my rulings are going to be on summary judgment and/or Daubert before you have to start filing your pretrial documents. So I don't give you much time in this compressed schedule, but at least this is structured so you will have my rulings at least four days -- maybe sooner -- before the first wave of pretrial documents have to come in.

So that means we will probably be looking at an oral argument or an evidentiary hearing on any summary judgment or Daubert motions on May 8, 2017. And from that point, I then work backwards from there to allow each side to have an appropriate or a reasonable amount of time to file their motions, oppositions, and replies. It is not as much as some of you have requested, but I think it is reasonable. It is not uncommon in this district to have these types of schedules.

Then, of course, one has to assume that discovery needs to close before the deadlines for filing summary judgment and Daubert, both expert discovery and fact discovery. So I then worked backwards from that period to end up at the draft

schedule that I've presented to you all.

So that's the thinking behind this. You are welcome to try to talk me into a different approach, but hopefully you will see that I've given this a fair amount of thought. I have read everything that you all have provided so we can talk about what we need to do.

I do have a technical question, because I'm just not that familiar with it. You will see in item 16 I have put in, as defendant requested, a deadline for defendant to comply with Section 282(c) of Title 35 of the United States Code.

Could someone talk to me about what really that means practically, logistically, and legally

State your name before speaking.

MR. OLIVER: This is Andrew Oliver for defendant.

That section of the code just states that any party that is going to present an invalidity defense at trial -- and I'm paraphrasing; I can't quote it exactly -- but any party who is going to present a patent invalidity defense at trial has to file a disclosure identifying certain things about certain prior art that they are going to use, and if you don't file that disclosure, essentially the invalidity defense is waived.

THE COURT: And it struck me -- and this is part of what is motivating my question -- I assume one would have to disclose invalidity contentions or defenses way before then so that that can be explored in discovery and even motion

practice.

So what am I missing here?

MR. OLIVER: I think this is probably a remnant of a time before many district courts adopted patent local rules and a remnant of a time from when close of discovery was compressed closer to trial, and so they wanted to make sure that if somebody was hanging on and not answering a contention interrogatory about invalidity defenses, that it would be set in stone before trial, I think.

THE COURT: I am expecting, if and when on June 23rd, 2017, defendant complies with 35 U.S.C. 282(c), nothing they say will be a surprise to plaintiff, and plaintiff will have had a full opportunity for discovery, including motion practice on those issues.

Am I correct? And do we need to do something different here?

MR. EDMONDS: Your Honor, I have been doing patent litigation for about 20 years. I remember this statute. I think it is essentially a nullity at this point in time. There are cases -- I didn't know it would be a question -- but there are cases where a plaintiff has tried to jam a defendant because they didn't make that disclosure, and the courts have said, no, the fact disclosures and expert disclosures suffice for this.

Because we have fact discovery deadline, because we

have an expert deadline, I don't think there is a need for this deadline. I don't see it on scheduling orders anymore. It is really not used. I think your point is well taken. It would be, if anything, redundant, and, at worst, I guess a "gotcha" if somebody forgot to do it, and that's not what we have in mind.

MR. MANSFIELD: If I could chime in for a second. It also not a last date that you can wait to disclosure invalidity. I have had people try this before -- if someone has a different view of the law, obviously state it. You can't just sandbag it and just do it then if there are requirements that you do it before.

THE COURT: So I would like to take out, Item 16, because it just reads strange to me in this context. If somebody feels a need to build an earlier deadline for doing that, just tell me when it should be, and I will add it. Otherwise, if you can all deal with it through interrogatories, expert reports, or however else you do it, that's fine with me. So if you need me to add it somewhere earlier, I would be glad to. I just don't want anything in here that implies that you can make a brand-new invalidity disclosure on June 23rd. I am sure it is my inexperience with patent cases that makes me think this is weird.

MR. OLIVER: In my experience -- and this is not necessarily how the statute reads -- but in my experience this

is often more of a narrowing than a broadening. So if somebody files an expert property or an invalidity contention with 100 pieces of prior art, and then when it gets time for trial they disclose some subset of that rather than expanding that. But given the discussion we've had, I think defendant is perfectly satisfied with taking it off of the schedule.

THE COURT: And I think that you are going to have to start filing pretrial documents well before June 23rd to prepare for our July 11th pretrial conference, we will know exactly what invalidity contentions may or may not have to be addressed well before then.

The other matter that I just want to call to your attention since it may be a little bit more unique to either the District of Oregon or me, take a look at Item 1. Although we are reopening discovery later this week, I do add there will be no motions to compel without prior leave of the Court.

You may have noticed in the new amendments to the Federal Rules of Civil Procedure generally, but became effective last December, that is now something that has been encouraged in the amendments to Rule 16. I have been doing that pretty much since I took the bench five years ago.

My experience has been that parties sometimes don't really take their conferral obligations all that seriously. They will threaten motions to compel or withhold production and then somebody files a really big, thick stack of motion to

compel that really should have been able to resolved earlier. So my rule is you can't file any motions to compel without prior leave of the Court. If you want prior leave, contact my courtroom deputy either together on a joint telephone conference or in an e-mail copied to the other side.

My courtroom deputy, by the way, today is Trish Hunt. She is filling in this week because my regular courtroom deputy, Mary Austad, is out this week. Contact my regular courtroom deputy. If you don't set it forth in your e-mail, she will probably ask you. She will certainly ask you to set it forth to briefly describe what the dispute is about. If that description adequately sets forth both sides' positions, fine. If not, if it is only the movant's position, we will briefly ask for a responsive e-mail from the respondent what their position is.

This is not the time to do a full-blown motion to compel argument via e-mail or with lots of attachments. I just want to get a sense of what the dispute or disputes are about so I can think about it briefly before I hear our telephone conference. Mary will then set up our telephone conference to talk about these disputes, and we will talk our way through it.

My experience has been 80 to 90 percent of discovery disputes can be resolved informally, inexpensively, and promptly with these types of telephone conferences. Now, the e-mails you send me will not be part of the appellate record,

unless you choose to file it. You will see, even as we get close to trial, I will do some things informally by e-mail. We don't put those in the official court docket, but you are certainly welcome, and I will never be insulted if you think that something is important, and you want to attach an e-mail or e-mail exchange, file it in the docket, and you will have it for appellate purposes.

But I try to resolve some disputes that we can informally, quickly, and inexpensively. So we will talk our way through these discovery disputes. If you tell me that you really need to preserve a particular point mostly for appellate purposes, or if there is some real difficult nuances of the law or the facts that mean that you really need and should be given an opportunity to brief it, tell me. I will give you the opportunity to brief it. I have seen occasionally people explain that to me. It is usually dealing with areas like attorney-client privilege or trade secrets or something like that.

I will give you the opportunity to brief it, and we will do that. But that basically could take a large stack of motion to compel and reduce it to one to two specific issues. Such things as burdensomeness, proportionality, relevance, reasonableness of a request or a search parameter, we usually can talk about that on the telephone and find an appropriate resolution.

If you disagree with my ruling, first of all, it will be on the record, so you'll have a record of that. If you tell me, though, I'm really making a big mistake, and it is an important issue, and you really want an opportunity to brief it, you are welcome to say that. But that will at least narrow down and confine and focus what the real dispute should be about. So that's what I mean by no motions to compel without prior leave.

MR. MANSFIELD: Is it safe to assume that any discovery dispute would be subject to this procedure? For instance, if it was a protective order or a dispute over a designation of a document?

THE COURT: Yes. Basically no motions relating to discovery issues can be filed without my permission. Obviously if you have a dispute, confer with each other, try to get it resolved. If you can't, call Mary. We will get on the phone. We most likely will get it resolved on the phone. If not, I will give you leave to file what you need to file. By the way, speaking of protective orders, I assume you have a protective order already from Texas.

MR. MANSFIELD: If I could maybe speak to that. There is a protective order in Texas. We have an issue, and it has already arisen in circumstances that we don't need to go into. The lead case in Texas you may remember, because it is in your order, is the SpaceCo case. Because that was the lead

case, many of the relevant documents and docket entries are in that and have not been transferred to our PACER. I found this out recently when I talked to the clerk. She advised that we consult with you because we obviously need to have those be part of this record, and I don't know how Your Honor wants to handle that. Again, maybe it is just you ask the clerk to call the other clerk or something or maybe you make an order or something. We need to get all of the Markman and the protective order and all of those other things. For instance, right now you can't file a sealed pleading because there is no protective order in our docket.

THE COURT: I will ask you all to confer and find the most efficient, cost-effective, reasonable way to accomplish this. And if that means you want to submit to me a new stipulated protective order, submit it to me, and I'll sign it. I don't know exactly what's in the SpaceCo case other than the documents I've looked at. But my guess is, given at least that one of the patents in that litigation isn't even at issue in this case, hopefully we don't have everything that is in that case needing to be imported here.

So perhaps what you all can do is figure out what you really need or want in this case and have it refiled. Maybe that's not an easy way or an inexpensive way to do it, in which case tell me what you want. Especially if you all agree on what you want, I will do whatever you want, as long as you all

agree it is within reason. But give it some thought as to what is going to be a common sense, efficient way to get us what we need.

If it turns out to be that we need to get everything from that case, give me a proposed order. But that doesn't strike me as the best solution, given that we're going to get more than we really need here. But I'll let you all figure that out. If you need to get me a stipulated order, that's fine.

By the way, you all know, or John and Jacob can tell you, in this district we do have a model protective order that we typically use. We have a one-tier and a two-tier, depending on whether we're dealing with competitors.

My general presumption is if the parties can agree on a form of a stipulated protective order that's different than those, fine, I will give you that, unless it is unreasonable. My bar for unreasonableness is pretty high. But if you disagree, then my default is going to be what's wrong with our local model, either one tier or two tier. And there, the burden is going to be on whoever disagrees with what the local model is. It is not beyond the possibility to say, "Oh, you make a good point. Our local is deficient or can be improved in this respect," and then I will do it your way and maybe even propose that we change our local model.

But other than that, I have seen in the olden days

people squabble over a few words that really don't make a bit of difference just because each side wants to do it their way or the way they are used to. Then my default is going to be to follow our local model unless it is meaningfully different.

The other thing I want to point out to you is Item 6 on summary judgment. I have been practicing for a while. I started my practice in 1981. I practiced for four, four and a half years with Main Justice, the U.S. Department of Justice Antitrust Division, and then I moved to Oregon in 1986 and practiced with the Perkins Coie law firm for 25 years and then became a federal judge a little more than five years ago, June of 2011.

For those of you who have been practicing a while, you may remember these older concise statements of undisputed facts that were part of summary judgment. I think they are a great idea. They turned out not to be so good and so helpful when the judges don't really enforce them. But when the judge enforces them, they are a beautiful idea, and so I like them. I enforce them.

Let me explain to you what I mean. If somebody wants to file a motion for summary judgment or partial summary judgment, that's fine. What you will need to do is convince me of two things obviously: That there is no material facts that are in genuine dispute that require a jury resolution; and looking at these undisputed facts, you are right on the law.

Obviously we all know how to fight over legal propositions.

So the hard part often comes in figuring out whether there is a genuine dispute. Well, we know that there is background that one side likes to provide or the other side likes to provide to help frame the questions and maybe even try to influence the decision-maker who is on the side of righteousness and justice and who is not. That's fine. I'm not going to stop you from putting that stuff in; I can't do that. But those really aren't critical to deciding a summary judgment motion.

So what is critical is if you are going to tell me that you are entitled to summary judgment for a particular claim or even a particular issue, it is going to be because you say there are most likely a handful of key facts that you contend are undisputed. You can give me all of your other background wherever you want to give it to me, probably in your memorandum in support of your motion. But there is going to be a separate document that I require called a concise statement of material undisputed facts where the movant tells me the following three, four, five, six -- whatever -- facts -- one fact at a time/one brick at a time is undisputed and is necessary to resolving the issue. If you want to tell me by way of background that the other side is a horrible company that does all sorts of terrible, mean things, first of all, don't put that in there. But if you have to, put it in your

background section. It doesn't belong in the concise statement of undisputed facts, because obviously it is going to be disputed. So put only those things that you really think are undisputed and are necessary to win your motion and give me pinpoint citations to where in the record evidence that you submit I can find proof that it really is undisputed.

Then the respondent, in response, in addition to giving me their memorandum where they put in their background how wonderful they are and how terrible the other side is -- by the way, I'm talking about companies; I'm not talking about lawyers. I don't want to hear invective about each other's lawyering. Enough said about that.

So the respondent in the concise statement says either that they agree with a specific numbered fact. Let's say movant's concise undisputed No. 1, they either agree or they don't agree, or they can agree for purposes of summary judgment while reserving the opportunity to disagree at trial. But for summary judgment, they don't challenge it for No. 1. Fine. Nothing more needs to be said about No. 1.

No. 2, let's suppose they disagree with that fact. They state that they disagree with that fact. They can concisely tell me why they disagree with that fact or why there is a genuine issue. Then they identify specific portions in the evidentiary record that's part of summary judgment either that the movant submitted or that the respondent is going to

submit that shows me where there is genuine issue for trial on that particular issue.

Or maybe they want to say, "You know, even if you find that the movant's facts are correct or are undisputed, there are some additional facts for why the movant should have his motion denied." Then you would add that to the respondent's concise statement. Now, here, you don't have to convince me obviously that these additional facts are undisputed. You just have to show me that there is at least a genuine issue, a genuine question for those facts that the jury needs to decide. Then obviously I will assume those facts in the light most favorable to the non-moving party.

If for whatever reason the original moving party in their reply wants to argue, no, those facts really are undisputed, and it is not the way the respondent says, you're welcome to do it and try to show me why it is not a genuine issue in your reply. More likely what I've seen is the movant in the reply will say that fact is legally irrelevant. "Even if one accepts that fact, it doesn't deprive me of winning the motion for summary judgment or partial summary judgment that I have moved for. Here is why legally." That's the more likely situation.

But at least that way it will enable me to very quickly and easily -- that's also a relative term -- figure out: Do we really have genuine issues of fact, or is it just a

hard legal question that we need to analyze?

By the way, I have left something else out. It is in Item 6, and that is the movant for summary judgment or partial summary judgment has an obligation to send me separately stipulations of fact. Confer with the other side. If it is stipulated for all purposes, fine. If you are not ready to do that, and you are willing to stipulate for purposes of summary judgment, that's fine too. Just make that clear.

At least that way when I write up my opinion -- and most of my summary judgment rulings are written, not all, but most are. I at least will be able to take the stipulated facts that you have given me and know, okay, these are part of some background facts that help set the stage that I don't need to worry about digging up evidentiary citations for.

So that's what I'm talking about on Item 6 for summary judgment.

Daubert motions. All I'll say at this stage -- and I don't have the cite. John, maybe you have it somewhere else. But I have sat by designation on the Ninth Circuit. I wrote a decision -- Nicholle, was that in '14 or '15?

LAW CLERK: '14, I think.

THE COURT: '14. The name of the case was, I believe, Pomona v. SQM North America from 2014. If you go back and check some of the recent Ninth Circuit decisions on Daubert, that was from 2014.

MR. MANSFIELD: 750 F.3d 1036, Pomona v. SQM North America Corporation.

THE COURT: Thank you.

My recollection is that it was unanimous, and it sets forth how I view Daubert criteria. It obviously is based on Ninth Circuit precedent. Obviously it is now Ninth Circuit precedent. So if you are going to file a Daubert motion, make sure you are aware of that case. Obviously if later Ninth Circuit decisions come out, especially en banc or Supreme Court decisions that affect that analysis, obviously I follow the latest and most binding precedent. But if you want to know how do I view Daubert, that's the best way to see it.

Okay. Does anyone want to talk about any of the items or dates or deadlines or issues that I have addressed on the case management order? I have been talking for a while, but I wanted to give you this basic framework. Any issues?

Maybe before we do that, although I will give you that opportunity, I've looked at least some of the diagrams from the Markman hearing and the objections, and this doesn't strike me as an extremely technical patent case. I have seen some that were really simple. I had one where the claims I had to construe -- it was on an iPad cover -- where I had to construe top, bottom, flap, and insert said flap. I loved that. That was nice. Then, again, John brought me one about a year or two ago where I had to get into cache coherence. That

was more complicated. This one strikes me in the middle.

Does anyone disagree?

Okay. So I don't think I'm going to need any type of technical tutorial on this technology. Anybody disagree? Okay. I don't know what you are going to do in terms if this case goes to a jury trial in terms of technical tutorial, a demonstrative for the jury, but if so, I would like to see that in advance.

I also don't think this case is going to need any type of court-appointed technical expert. I do that in some cases. I don't think I am going to need it in this case. Anybody disagree?

Okay. So does anybody want to say anything either about this lawsuit that I may not know or understand that I should know and then does anyone want to express concerns or suggested tweaks on the proposed schedule?

I will start with plaintiff.

MR. EDMONDS: Your Honor, John Edmonds for the plaintiff. I think mostly questions of clarifications to make sure everybody understands what the rules are going forward. You mention the Northern District's rules. I didn't quite understand how that would work in a case where we would have already passed most of those junctures in the case.

THE COURT: Right, I agree. If there is something that I have not built into this schedule, then tell me, and we

need to build it in. But I was building this schedule in on a going-forward basis, understanding that the defendant wants the opportunity to revise some of their expert reports, and I am going to give that to them.

If there are things that have already happened in this case that are not addressed here that somebody thinks that I better address or I need to address for clarity, you need to tell me.

MR. EDMONDS: The rules are the same in Texas, the rules I am talking about. So Patent Rule 3-1, which is infringement disclosures, that deadline has passed. 3-3, which is invalidity contention disclosures, that deadline has passed.

Is the Court saying that those deadlines are essentially -- we are not going to worry about those disclosures? We are going to let people supplement expert reports as they see fit at this point? Do we still need to go back and look at those, or do they need to be amended? How does the Court want to address that?

THE COURT: What's the defendant's position on that?

MR. OLIVER: I guess, from defendant's position, both parties in expert reports disclosed things that were not in the preliminary contention. Plaintiff would probably disagree with this and say that their record was clean and that ours was supplemented, but our position is that they disclosed some significant infringement arguments that were not in the

preliminary contentions.

So the way we see it, both parties have already supplemented, and the cleanest way to make sure that everybody knows the contentions of the other party is, and there are no surprises, would be a simple contention interrogatory by each party saying disclose your infringement positions or disclose your invalidity positions. Then if there is anything new or any surprises, those will come out in response to that interrogatory.

THE COURT: Since I don't know as much about this case as I'm going to know eventually, and I don't know that much about it right now, it strikes me, sort of taking it one small step at a time, that idea makes sense. Both sides, as soon as discovery reopens later this week, should serve appropriate interrogatories.

By the way, you'll see in the local rules we do have a local rule that prohibits contention interrogatories. What we mean by that here is something that doesn't apply as closely in patent cases, but I think if you all have an interrogatory to each other that basically says disclose all invalidity contentions or other appropriate types of matters, that will not run afoul of our prohibition of contention interrogatories.

You probably should submit to each other whatever interrogatories of that nature you want sooner rather than later. Let's say you really should do it shortly after

Labor Day. I don't want to put another deadline here unless you want me to. But my advice is do it sooner rather than later. The other side will respond in 30 days. That will give both sides the opportunity between now and when fact discovery closes on December 23rd, the opportunity to take whatever additional fact discovery may be needed on anything that may be learned or new.

I am not going to preclude -- I am not going to decide right now what I'm going to do if someone puts in something new in response to that interrogatory and the other side says, "That is horribly prejudicial. It is terribly unfair. They shouldn't be allowed to do it." Bring that to my attention sooner rather than later.

Basically confer with each other. If you can't resolve it, call Mary, and we will talk about it, and we will figure out what to do. One of my questions is going to be, of course, well, since fact discovery doesn't close until December 23rd of this year, you've got plenty of time to take whatever discovery you need on this new issue even if it is a new issue and how are you being unfairly prejudiced. Maybe the answer might be, "Well, we have already deposed so and so on this, and they are not letting me reopen the deposition." Well, that's not going to be a smart move by whoever is not letting somebody reopen a deposition.

Maybe the response is, "Well, we have already deposed

so and so on this, and they are in this other part of the country. It's an additional expense or burden to go depose them again." If you can't figure out what to do appropriately with each other, call me, and we will talk our way through it and figure something out.

But basically I think the solution to this problem is going to be serve your -- for lack of a better term -- contention interrogatories sooner rather than later to see what has changed. That will really pin people done. If you think that someone is changing something unreasonably that you are being unfairly and unreasonably prejudiced by, confer with the other side, see if you can work out some mitigation of that prejudice. If not, call me, and we will talk about it. But you are not going to get much relief from the Court if it simply is, "Well, this is something brand-new. The deadline for saying such and such has already passed. Therefore, they shouldn't be allowed to change their mind" -- and I know about the change in counsel -- "but they shouldn't be allowed to say something now that they have new counsel, but thought of something that should have been said earlier."

My response to that is going to be, "How are you being unreasonably prejudiced?" If you are, we will figure out a fair and appropriate way to mitigate any unreasonable prejudice, if we can. If we can't, well, then, I'll just deal with what I have to deal with. Most prejudice can be dealt

with and can be modified if people act promptly and reasonably, but I think that's the best answer I can give to that question right now in the abstract.

MR. EDMONDS: I think all of my questions are covered. As the Court mentioned, we were a couple of weeks from the close of discovery before, so so much had been done. In the Eastern District there is one thing unique about their procedures that are not done even in the Northern District. In the discovery order, there is a provision that essentially says: All sides produce all relevant documents without the need for a request for production. So requests for production simply aren't used. I think we produced 300,000 pages of documents sua sponte, if you will.

Does the Court envision that the parties will reopen that can of worms? Plaintiff is willing to say we will operate under that rule and produce it under what we have operated for so long.

THE COURT: Here is what worries me and let me hear defendant's side as well as your response. I don't like "gotcha" games. So I think it is a wonderful idea for both sides to present all relevant documents. But what I don't want to see happen is I don't want plaintiff to be operating under that rule, defendant then to wait until basically you have to present your documents a few weeks before pretrial conference, and then all of a sudden you spring on them a very important,

significant document helpful to the defense that they have never seen before, and your response is, "Well, you have never served me a discovery request and that Eastern District rule doesn't apply in the District of Oregon." That's not fair and appropriate either.

Now, what's the best way to deal with that? I'm not sure. Maybe it is a document request, "Please produce all relevant documents." I don't know.

What do you all think is the best and fair and efficient way to deal with this, given that I'm not going to let that type of unfair surprise/gotcha/you didn't ask for the documents, so I'm not showing you this key document until right before trial, I'm not going to let that happen.

What do you all think is the best way to deal with it?

MR. OLIVER: From the defendant's perspective, there has been a lot of production. I think it is good for parties to normally produce the documents that they think are relevant. We do think there are a few categories of documents that we have not seen that are relevant to this case and think that written requests for production need to be served with respect to those.

We are likely to serve a broader set of requests for production of documents, fully understanding that the answer to those may be, "We've already produced all of these documents."

But we want to make sure the record is clear that where we think documents are relevant, we're not just relying on the opposing party's view of what documents are relevant to the case.

THE COURT: So it sounds like what you are suggesting -- it is John, right?

MR. EDMONDS: Yes.

THE COURT: I'll get back to John in a moment.

Maybe both sides should serve document requests on each other. But what I'm not interested in is some type of motion to compel where we asked for so many things that would be so incredibly burdensome, and they are not producing it. Therefore, order them to produce it. I'm not going to let that type of discovery expense be incredibly burdensome. On the other hand, it does protect you so that if they come up with a document that really would have been responsive to your request that they should have produced earlier, they are not going to be able to get it in by saying, "Well, you never asked for that type of information."

So craft your document requests and serve them on each other. Obviously anything that has already been exchanged need not be produced and exchanged again obviously. But if you want to make sure you have a catch-all that you have caught all the things that they might reasonably have, go ahead and make sure you ask them for it. But I'm not going to let discovery

requests be a weapon by either side to make the other side incur even more expense than they've already incurred to date.

John, do you want to be heard further on that?

MR. EDMONDS: I mean, the way it works in practice is that a party says you haven't produced this, and you are under a court-ordered obligation to produce it. If the other side disagrees with that, then the Court resolves it. I guess the beauty of that is it doesn't require a redo of that entire process. To me, that would be the more directed process, like Mr. Oliver saying if there is something that they think they haven't received that they should have received, they could say, "You were supposed to produce everything relevant, but we have not received X. We need X." Then we would either produce X, or dispute X, and it should be produced.

THE COURT: It doesn't seem like it is that burdensome. If they think you haven't produced X, or they think you haven't produced Y, send a document request to each other. It will either get produced, or there will be some response for why you are not going to produce it. If there is a response, confer. If you can't resolve it, call Mary, and we will talk about it on the telephone. Unless it is incredibly burdensome and lacking in proportionality, I will say produce it when we get there.

MR. EDMONDS: A couple of clarifications. So there was an issue that has been alluded to in the briefings about

there was a deadline for disclosing opinions of counsel in the past, and one was not disclosed. Planar announced its intention to rely on one. Typically in patent cases there is some deadline for disclosing that type of information so on last day of discovery somebody doesn't drop it. Plus typically, if materiality is an issue, with willfulness, then experts may weigh in on that, so you need to have it disclosed at some point early.

We can obviously makes requests, like you said, before Labor Day, to get that out. But would we expect to get that information then, or would they be able to sit back?

THE COURT: They have to respond to your request. Put it in the form of an interrogatory or a document request. They will have to respond to that.

As I understand it, Planar's position is they don't have a direct advice of counsel letter, but they are relying derivatively upon some other advice that was given to -- what's the name?

MR. OLIVER: High Grade.

THE COURT: High Grade. So you all know what's at issue there.

What would be the consequence of the fact that they might not have disclosed that within the Eastern District of Texas's deadline? The answer from the District of Oregon is going to be no consequence. But if there is other advice of

counsel, confer among yourselves. If there is something else that you in good faith need to share with them, share it with them. If you want to make sure that all I's are dotted and T's are crossed, send it to them in a document request or interrogatory or both. Then you can explore the dimensions of High Grade and then argue to me later whether or not that type of derivative reliance does or doesn't count legally.

MR. EDMONDS: I think I understand. Typically the way it works, one side will claim privilege. Then at some point in the case they say, "Okay. We are going to waive privilege, because we are going to rely on it." It sounds like if they are going to rely on it, it is now or never.

THE COURT: Absolutely. I don't let privilege be asserted, either in patent cases or elsewhere, as a sword and a shield, where it is a shield, "We are not going to give you this," and the day before trial, "Oh, we have changed our mind, so now we are doing it." That doesn't work that way. If you assert privilege to something, and it is truly privileged, then you are stuck, and you can't waive privilege on it later, especially if it causes prejudice to the other side, which it almost certainly will unless you change your mind, let's say, within 24 hours.

MR. EDMONDS: My last question was, we have taken their 30(b)(6) deposition. For example, it was in the briefing on the 30(b)(6) deposition, the designee said, "We haven't

received an opinion of counsel." We have this deposition there. 30(b)(6) testimony is normally binding. I understand the spirit of the Court's rulings here, but the question is: Does the Court have an idea of how we would handle that? Should they notify us, "We have now changed our mind on some of this testimony," or can we assume the testimony we have so far we can rely on as binding?

THE COURT: Tell me if I have misunderstood. As I read what you sent to me in your joint status report, it really hasn't changed. "We didn't have a direct advice of counsel letter," and that the respondent didn't understand the question to be, "Do you have some type of derivative reliance on High Grade's reliance?"

Am I correct in understanding that's Planar's position?

MR. OLIVER: There was a very direct question to him about whether Planar itself had commissioned an opinion of counsel. The question was answered accurately, and there was no follow-up on it.

THE COURT: Even if the question was more broadly phrased than that, if that's the person who was answering the question understood it, did Planar retain counsel and ask counsel for an advice of counsel opinion, and the answer was no, and the person answering the question did not believe that the question was saying, "Did Planar rely upon High Grade's

counsel's opinion to High Grade," then I don't think it changes the answer, but I do think now, in a relatively loose sense, I'm letting this now come in and be revisited. If they need to re-depose that 30(b)(6) to explore more issues, of course, they will be allowed do that.

I'm not treating this as a changed answer necessarily, but nor am I going to deny them the opportunity now to follow up on this question now that, if you will, this misunderstanding has come to light. So if they need to re-depose that 30(b)(6), they are allowed to do that.

MR. EDMONDS: Thank you, Your Honor.

Those clarifications help us going forward. I appreciate it.

THE COURT: You will get a sense that I am sort of very pragmatic. I try to be practical in some of these things. I want both sides to have fair and reasonable opportunities to present their full case, to present their full defense, to not play games with the other side and to not cause unreasonable or unfair prejudice to the other side.

That's how I will structure most of my rulings. Hopefully, then we will get a resolution that's reasonably inexpensive, reasonably prompt, but hopefully reasonably just as well.

I don't push people to settle cases. I am meeting outside counsel for the first time here. Local counsel here

are very experienced. They know their way around these cases, and I assume from what I have been reading that you all are very experienced patent litigators. You know what you are doing. You will know whether you can or can't or should or shouldn't settle this case.

I'm not going to order anybody to any type of ADR. If you want the Court's assistance in finding somebody in this building to serve as a settlement judge, contact my courtroom deputy. If both sides agree, we will find someone. My best opinion, and tell me if you all agree or disagree, because I would be interested in all of your perspectives, as experienced patent litigators, I don't think for patent litigation it is a particularly good idea to get a generalist judge, whether it be a district judge or a magistrate judge -- in the District of Oregon. I don't know about the other districts that have specialized folks.

But I don't think it would be particularly effective to help you in a patent case to deal with a judicial settlement conference. I think you are better off -- if you want to do a mediation or settlement conference -- to go find someone who both understands patent ligation and maybe even this particular technology in a way that both sides feel comfortable and then go find your own private mediator.

Our settlement judges -- -- and I do a number of settlement conference -- we're pretty good at certain types of

disputes. I don't think patent litigation is something we have enough experience with to help in a settlement conference.

Am I wrong?

MR. EDMONDS: Our prior mediation was before retired Judge Ward, who was one of the most experienced patent judges in the country, and it did not bear fruit. So we have already done that.

THE COURT: I know there are some differences. I know the products in SpaceCo are different. It may or may not be the case that after everybody sees how the trial turns out in June in SpaceCo, they may want to revisit settlement issues here, or not.

By the way, is that a pretty firm trial date?

MR. EDMONDS: We have no reason to suspect it is not.

THE COURT: Okay. I am going to assume that this case is going to trial on July 17th. Please understand that once we set a calendar with this degree of specificity, I rarely -- not unheard of -- but I rarely, unless there is a really good reason, would start departing from these dates.

So if for whatever reason you come to me in early December and say, "By the way, we would like another three or four months to complete discovery and to do this and push our trial date three or four months," even if it is agreed, I probably will not grant it, unless it is a darn good reason. A darn good reason might be that you all were waiting for me that

I took long to get you an answer on and therefore it interfered with your ability to meet this schedule. That's a good reason. I will leave to your imagination what other good reasons might be. But you should really assume that these are pretty firm dates.

Obviously to the extent that you all can agree among yourselves minor modifications to these dates, as long as they don't involve court hearings or the dates that you have to file things with the Court, you don't need my approval, as long as you agree to it. For example, expert discovery close is February 17th, and one of your experts you want to depose isn't available until February 21st. As long as you agree with each other and document it somehow, even like an e-mail, that you will take expert X's deposition on February 21st, that's fine with me. You don't need to get me involved in it. Do what you want.

However, I am expecting to see any motions for summary judgment and Daubert being filed on March 10th. If that's going to be delayed by a day or two, just call Mary and say that you need another day-or-two extension on that. Tell her whether the other side opposes or doesn't oppose. If it is a day-or-two extension and the other side doesn't oppose, Mary will just grant it by minute order. If it is a more significant extension, that will fit into this category of "there better be a good reason," because it will affect the

rest of the calendar going forward, or if it is opposed, I will get on the phone with you, and we will deal with it. But that's how we should all treat this schedule, as pretty darn firm.

Is there anything else we should talk about now?

MR. EDMONDS: None from the plaintiff. Thank you.

MR. OLIVER: Nothing from the defendant.

THE COURT: All right. It was a pleasure meeting the folks from out of town. It was pleasure seeing John and Jacob again.

Have we met before? I don't think we have.

MS. HOLM JENSEN: I'm not sure we have. I don't know.

THE COURT: I will disclose to you all that I do know Steve Going, although I don't think I have seen him in 20 years. He worked as a corporate associate at my old law firm Perkins Coie.

When did Steve leave? Do you know?

MS. HOLM JENSEN: Oh, goodness. Quite a while ago.

THE COURT: I did litigation at the firm. He was a corporate associate. I remember him, but I don't think I have seen him in 20 years.

Nice meeting you all. I look forward to working with you. If it doesn't resolve otherwise, we will have an interesting trial.

I find that Portland juries for the most part are pretty sophisticated. You may very well find a handful of Ph.D.s in our prospective jury panel between some of the high-tech companies -- not just Planar -- but the other high-tech companies in the area -- one or two or three people from them on our prospective juror pool. Whether you choose to use a peremptory on them, or not, that's your own tactical decision. But we have a pretty sophisticated panel here.

Let me tell you this: After civil trial, unless a party disagrees beforehand, and most of time lawyers don't, I invite the jurors who want to come out and meet with the lawyers and the parties to come out and talk to us all. I appreciated that back when I was a trial lawyer, and so I continue that practice.

I will moderate that discussion. There will be a few questions that I'll say are off the table. It rarely happens that we get to those. But for the most part, I invite the jurors to -- at the end of the trial -- after the verdict is received, or if it is a hung jury, if the jury is discharged, when we are done with the jury, I will invite those that want to come back and talk to the lawyers and parties to do so in my presence back in the courtroom.

My experience has been anywhere from half to three-quarters want to come back. Usually the folks that don't want to come back, they really wanted to come back, but they

have other commitments that they want to get to, and then we will have a little dialogue. It is off the record.

The lawyers can ask the jurors what they found persuasive, what was not persuasive, what they thought of their lawyering techniques, what they thought of the clarity of the demonstrative evidence, the clarity of their presentations, things like that, and it is usually a pretty interesting discussion.

By the way, to help to entice the jurors to want to come back, I say, "The lawyers will ask you questions, or the clients might, and you don't have to answer if you don't want to, but they are very interested in what you have to say. In exchange, you can ask them questions." So I let the jurors ask the parties and the lawyers questions. Again, the lawyers and the parties, they don't have to answer if they don't want to. They can say pass. But we have an interesting dialogue. So I think if we get that far, you will see that we have very conscientious, careful, intelligent jurors here that work their way through disputes.

I think patent litigation, maybe patent litigation/ antitrust litigation, are some of the difficult things that we ask jurors to do on the civil side, but you will, I think, be impressed with our juror pool out here. That said, I don't have any clue which way it will fall, having smarter jurors than non-smarter jurors. I don't know. But I think you will

like trying a case out here.

One of the things to think about, but we will wait for you to worry about this, and that's the following: We're planning on a seven-day jury trial. What normally happens is on day one we will probably have our jury selected by lunchtime. You will do your opening statements in the afternoon. Maybe hopefully we will get to at least one or two or three witnesses in the afternoon.

From that point forward, we have trial days from 9:00 to 5:00, usually about an hour and 15 minutes for lunch, a 15-minute break in the morning, a 15-minute break in the afternoon. So in round numbers we generally can get between five and a half to six hours of real witness testimony done during trial on any given regular trial day.

If you add up those numbers -- figure we will get an hour or two of testimony on day one, five and a half hours to six hours of testimony on day two, day three, day four. What that means is that this case will get to the jury no later than the early afternoon of day six, because that way they need some time to begin their deliberations and probably day seven to do their deliberations.

So when you add up those numbers of available hours, and as you will see in witness statements, I am going to ask each side propounding a witness to give me a realistic estimate of direct examination. Do you think this witness will be a

15-minute witness? Or a two-hour witness? Or a four-hour witness? We add up all that time. I then have a rough rule of thumb of maybe to 50 to 75 percent of direct will be used for cross, depending on who the witnesses are, and I add it up.

If we're within the ballpark of something that will keep us to a seven-day jury trial, fine, I will leave you alone. Sometimes, and more often than not, when I get people's estimates, ah, they want to try a 15-day trial in a seven-day window. So we're not going to do that.

So then what I do, I use a chess clock. Wow, does that work. It works beautifully, because I will give each side a certain number of hours. We will talk about it in advance to make sure it is the right amount. Most of the time it doesn't count for your opening statement. It will never count for your closing argument. It will only count for the times when you are questioning the witnesses, but it includes all of your directs and redirects, your crosses and your recrosses.

And one of benefits of that is I don't ever have to worry about somebody asking marginally relevant/marginally irrelevant questions to run down the other side's clock and do something that's going to take longer, because as long as it is only your clock that's ticking, you can take as much time as you want asking marginally relevant questions and repeating oneself over and over and over. So I generally won't interfere with that.

But I'm also quite strict saying, if you have 12 hours or 15 hours per side, you are not going to get any more than that. Use it as you see fit. What I have noticed is that people are remarkably efficient about that. It makes for very efficient directs and crosses. Frankly, juries prefer it. It means that I don't have to worry about time being wasted, and you all end up trying a much better case because you are being very efficient.

We will figure out later whether we should or shouldn't use a chess clock in this case. We will decide that at the pretrial conference. But give some thought to that as you are figuring your estimated times for direct examinations for your witnesses.

The other thing, too, if you are going to show videos of perpetuated depositions in lieu of live testimony, I encourage both sides to work together to come up with a good, tightly edited video, because we don't want to put the jury to sleep. A two-hour video of a witness will put them to sleep.

In addition, you will probably see -- I used to do it in the beginning, until I changed, we show on the video: Mr. Witness, by whom are you employed? What are your duties? How long have you been at this company? Stuff like that. Who do you report to?

A much more efficient way to do it is for the parties to work together in advance and come up with a stipulated

paragraph that I will just read to the jury. Members of the jury, we're now going to hear from Mr. So and So or Ms. So and So. Ms. So and So is in the following position. She reports to this and that. She has been doing this position for X number of years, and her testimony is being presented to you because she is the one who actually did the experiment that you have heard that happened on January 2nd, 2008 regarding the such and such polymer, or something like that. Then you can just dive right into that video: So I understand you did the experiment on January 2nd. How did you prepare it?

Then the video will show everything. So feel free to think about how this is going to present to the jury and work with each other in advance so you can efficiently and effectively communicate to the jury what you need to communicate with the jury on those issues of video testimony. We can talk about demonstrative exhibits for trial much further down the road.

Then the only other question I had for you now, and I guess it is primarily for -- well, it could be for both sides. Does anybody right now anticipate any likely or potential motions for summary judgment or partial summary judgment that you want to alert me to? This is not binding on you. You won't have to file this motion. If you think of others, you are welcome to file others. But anything I should be thinking about in advance?

MR. OLIVER: From defendant's perspective, I don't know that there is anything that you need to think about in advance. I believe we are anticipating a motion for summary judgment on laches, and that's related to a case that was filed in 2009 by plaintiff and then dismissed in 2012. I believe that we are anticipating at least one motion for summary judgment of non-infringement on at least one of the patents.

I can't say whether that's the full scope, but I don't think that either of those are something you need to be concerned about at this point.

THE COURT: John, anything from plaintiff's perspective?

MR. EDMONDS: Again, we may talk to them about the infringement. I presume that our opposition to the motion for summary judgment on non-infringement is that it infringes, so that might be something that the Court could take up on uncontested facts.

THE COURT: It probably is premature, but does anybody have any expectations right now of a Daubert motion and whether or not we will be needing to hear any evidence at a Daubert motion? Obviously some Daubert motions can be heard on the papers; others require an evidentiary hearing.

Based upon the experts you have already seen exchanged, do you think it is likely or not likely we will get a Daubert motion, or not, or is it too early to tell?

MR. OLIVER: We have seen in opening reports from each parties, infringements and damages report from the plaintiff and an invalidity report from the defendant. Those may be modified under your schedule. Based on what we have seen from plaintiff, I don't think we are anticipating a Daubert motion. I do note that on a similar analysis there was a Daubert motion filed in the SpaceCo case, but we haven't anticipated filing a Daubert motion on that same point.

MR. EDMONDS: We haven't seen their damages report yet, but we don't have anything significant in mind at this point, Your Honor.

THE COURT: Thank you very much. It has been a pleasure meeting you. You know I'm here, in case there is anything I can do for you to help make the resolution just, speedy, and inexpensive, knowing that "inexpensive" and "speedy" are relative terms.

Thank you all very much.

COUNSEL: Thank you, Your Honor.

(Recess.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca August 28, 2016
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